

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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MARY B. A.,

Plaintiff,

v.

Civil Action No.  
3:19-CV-0607 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

COUGHLIN, GERHART LAW FIRM  
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LARS P. MEAD, ESQ.

FOR DEFENDANT

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DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on June 17, 2020, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the

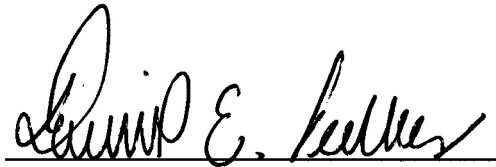
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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: June 29, 2020  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
MARY B. A.,

Plaintiff,

vs.

19-CV-607

Commissioner of Social Security,

Defendant.  
-----x

DECISION - June 17, 2020

James Hanley Federal Building, Syracuse, New York

HONORABLE DAVID E. PEEBLES

United States Magistrate Judge, Presiding

APPEARANCES (by telephone)

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*(315) 234-8546*

1           THE COURT: Let me express the Court's thanks to  
2 both of you for excellent presentations, both written and  
3 orally. I have enjoyed working with you on this case.

4           The plaintiff has commenced a proceeding pursuant  
5 to 42, United States Code, Section 405(g) to challenge a  
6 determination by the Commissioner of Social Security finding  
7 that she was not disabled at the relevant times and,  
8 therefore, ineligible for the disability insurance benefits  
9 for which she applied. The background is as follows.

10           Plaintiff was born in April 1958. She is currently  
11 62 years of age. She was 53 years old at the time of the  
12 alleged onset of her disability, whether you consider it to  
13 be October 31, 2011 or December 31, 2011. Plaintiff stands  
14 5-foot, 1-inch in height and has weighed at various times  
15 between 123 and 138 pounds.

16           Plaintiff is separated; she has been since 2014.  
17 She has three children and resides in a condominium in  
18 Apalachin, New York. Plaintiff is a high school graduate and  
19 has two years of college education postgraduation from high  
20 school. At the time plaintiff was in school, she attended  
21 regular classes. Plaintiff is right-handed and drives.

22           Plaintiff has worked at various positions, having  
23 stopped work on October 1, 2012. That's at page 305 of the  
24 Administrative Transcript. Plaintiff last worked as a  
25 cashier in a produce industry between June and October of

1 2012. She has also worked in two different locations between  
2 April 2008 and June 2010 as a restaurant server. She has  
3 worked in her husband's car sales business from 2001 to 2003,  
4 and continuing thereafter past 2004, though without pay.  
5 Plaintiff is a nail artist, is a licensed nail technician,  
6 and was self-employed in that capacity from 1997 to 2003.

7           Physically, plaintiff suffers from a right shoulder  
8 issue. In May of 2010 she indicated that it has been a  
9 problem for her for ten years. She suffered a Workers'  
10 Compensation injury to her shoulder in May of 2010. In June  
11 of 2010 she underwent arthroscopic decompensation and rotator  
12 cuff repair surgery. A second surgery was required of a  
13 similar nature in February of 2015 as to her right shoulder.  
14 Plaintiff testified she has no issues with regard to her left  
15 shoulder.

16           Plaintiff has also had breast reduction surgery and  
17 implant surgery. She in March of 2006 underwent a  
18 hysterectomy with mesh placement. In July of 2006 she  
19 underwent surgery for repair of a rectal prolapse,  
20 laparoscopic colon resection with rectopexy, plus bilateral  
21 ureteral stents. In February of 2008 she underwent an open  
22 right colectomy. In April of 2009 she underwent surgery for  
23 excision of the vaginal mesh with reconstruction of her  
24 vaginal wall. Those surgeries were done by Dr. Dhruv  
25 Agneshwar.

1 Plaintiff has seen Dr. Mark Wilson for her  
2 orthopedic issues, and has seen that doctor since May of  
3 2010. She has treated with Dr. Michael Barrett for her colon  
4 and rectal surgeries, and Dr. Keith Nichols since at least  
5 January of 2006 as a family physician. Plaintiff has  
6 residual pain, incontinence, shoulder pain, numbness,  
7 tingling. She also suffers from GERD, anemia and potentially  
8 fibromyositis.

9 Mentally, plaintiff has experienced anxiety,  
10 depression, and potentially PTSD, but has not undergone any  
11 specialized treatment for those conditions.

12 In terms of medications, plaintiff has taken  
13 hydrocodone for her shoulder; Cymbalta for her depression;  
14 Lorazepam for anxiety; Omeprazole for stomach issues; Ambien;  
15 acetaminophen; Proventil inhaler; Adderall; Lyrica; and  
16 Darvocet.

17 Plaintiff was a former smoker but apparently no  
18 longer smokes. Plaintiff has a fairly robust list of  
19 activities of daily living. She can clean, do laundry. She  
20 shops three times per week. She showers and grooms herself,  
21 dresses, makes her bed. She can prepare simple meals. She  
22 goes to the pool, goes to church, goes to the beach five  
23 times per week, walks, talks on the telephone. She likes  
24 sewing and reading.

25 Procedurally, plaintiff applied for Title II

1 disability insurance benefits on March 17, 2015, alleging an  
2 onset date of July 18, 2006. That was later amended at the  
3 hearing to December 31, 2011, although the Administrative Law  
4 Judge in her decision mistakenly suggests that the amendment  
5 was to October 31, 2011.

6 In making that application, plaintiff claimed the  
7 inability to work based upon a right shoulder issue,  
8 irritable bowel syndrome and other bowel issues, vaginal mesh  
9 insert issues, depression, anxiety, anemia, GERD, back issue  
10 and knee issues. A hearing was conducted by Administrative  
11 Law Judge Elizabeth Koennecke on December 12, 2017 to address  
12 plaintiff's application for benefits. On May 22, 2018 a  
13 supplemental hearing with a vocational expert was conducted  
14 by the Administrative Law Judge.

15 On May 31, 2018 ALJ Elizabeth Koennecke issued an  
16 unfavorable decision, which is the subject of this challenge.  
17 That became a final determination of the Agency on March 29,  
18 2019, when the Social Security Administration Appeals Council  
19 denied plaintiff's application for review of that decision.  
20 This action was commenced on May 22, 2019; and is, therefore,  
21 timely.

22 In her decision, Administrative Law Judge Koennecke  
23 applied the familiar five-step sequential test for  
24 determining disability. She noted at the outset that  
25 plaintiff was last insured on December 31, 2011. She then



1 determined that plaintiff had not engaged in substantial  
2 gainful activity between October 31, 2011, the date on which  
3 ALJ Koennecke believed was the amended onset date, to the  
4 date of last insured, or December 31, 2011.

5 At step two, ALJ Koennecke concluded that plaintiff  
6 suffers from severe impairments imposing more than minimal  
7 limitations on her ability to perform basic work functions,  
8 including a right shoulder impairment and  
9 gastrointestinal/gynecological impairment.

10 At step three, Administrative Law Judge Koennecke  
11 concluded that plaintiff's conditions do not meet or  
12 medically equal any of the listed presumptively disabling  
13 conditions set forth in the Commissioner's regulations;  
14 specifically, considering listing 1.02.

15 Plaintiff's medical history and records were  
16 thereafter surveyed, and based on the Administrative Law  
17 Judge Koennecke's review of the records, she determined that  
18 the plaintiff is capable of performing at a residual  
19 functional capacity, or RFC, light work as defined in the  
20 regulations, except she is unable to carry greater than  
21 10 pounds above shoulder level. Applying that RFC,  
22 Administrative Law Judge Koennecke concluded plaintiff is  
23 unable to perform her past relevant work at substantial  
24 gainful activity levels.

25 She concluded at step five, however, based on the

1 testimony of a vocational expert, that plaintiff is capable  
2 of performing available work in the national economy as a  
3 sales attendant, a photocopy machine operator, and a  
4 manicurist. She noted in her analysis that if plaintiff were  
5 capable of performing a full range of light work, the  
6 determination of not disabled would be directed by the  
7 Medical-Vocational Guidelines, and specifically Grid Rule  
8 202.20.

9           As you know, my task is limited. The Court's  
10 review is extremely deferential. The Court must determine  
11 whether correct legal principles were applied and whether the  
12 determination that resulted is supported by substantial  
13 evidence. Substantial evidence is defined as such relevant  
14 evidence as a reasonable mind might accept as adequate to  
15 support a conclusion. As the Second Circuit noted in *Brault*  
16 *versus Social Security Administration*, 683 F.3d 443 (Second  
17 Circuit 2012), this is an exacting standard, it is a far more  
18 demanding standard than even the clearly erroneous standard  
19 of review.

20           In this case we're dealing with a closed period,  
21 whether it is measured from October 31, 2011, as the  
22 Administrative Law Judge thought, or whether we're looking at  
23 whether plaintiff was disabled on December 31, 2011.

24           Plaintiff in support of her challenge to the  
25 determination raises several contentions. First, she notes

1 several errors apparent in Administrative Law Judge  
2 Koennecke's decision, and misstatements, including regarding  
3 the amended onset date, the finding of plaintiff being a  
4 younger individual, and the finding of no mental impairment.

5 Next, she challenges the evaluation of plaintiff's  
6 medical evidence, and specifically contends that the Treating  
7 Source Rule was not honored, particularly with regard to  
8 Dr. Nichols and Dr. Barrett, and particularly in connection  
9 with Dr. Nichols' mental health medical source statement.  
10 She then argues that the resulting determination is not  
11 supported by substantial evidence.

12 In terms of the Treating Source Rule, ordinarily  
13 the opinion of the treating physician regarding the nature  
14 and severity of an impairment is entitled to considerable  
15 deference, provided that it is supported by medically  
16 acceptable clinical and laboratory diagnostic techniques and  
17 is not inconsistent with other substantial evidence.  
18 Treating source opinions are not controlling, however, if  
19 they are contrary to other substantial evidence in the  
20 record, including opinions of other medical experts.

21 If an Administrative Law Judge does not give  
22 controlling weight to a treating source's opinion, she must  
23 apply several factors to determine what degree of weight  
24 should be assigned to the opinion, including the length of  
25 the treatment relationship and the frequency of examination;

1 the nature and extent of the treatment relationship; the  
2 degree to which the medical source has supported his or her  
3 opinion; the degree of consistency between the opinion and  
4 the record as a whole; whether the opinion is given by a  
5 specialist; and other evidence which may be brought to the  
6 attention of the ALJ.

7 In this case, in this circuit the Treating Source  
8 Rule requires consideration of those factors that are  
9 typically referred to as the *Burgess* factors. In my  
10 experience, it is rare to find an Administrative Law Judge  
11 rotely going through those factors, and in such a case the  
12 Court must review the record and be convinced based on a  
13 searching review of the record that the Treating Source Rule  
14 was not violated. *Estrella versus Berryhill*, 925 F.3d 90  
15 (Second Circuit 2019).

16 In this case I'll note a couple things of interest.  
17 First, the two doctors at issue, Dr. Nichols and Dr. Barrett,  
18 both treated the plaintiff over a significant period of time.  
19 Secondly, with regard at least to the physical aspects of the  
20 RFC, there is no countering medical opinion. The  
21 Administrative Law Judge has essentially formulated the RFC,  
22 the physical aspects of the RFC, from her own review of the  
23 medical evidence and notes and other evidence. And although  
24 that is certainly permitted in the case where common sense  
25 can dictate the results, certainly this is not a case where

1 there is an opposing opinion either from an examining source  
2 or a non-examining source when it comes to the physical  
3 aspect.

4 In this case Dr. Michael Barrett issued a medical  
5 source statement on December 20, 2016, and specifically at  
6 the header indicated, "This assessment is valid for the  
7 period from at least September 30, 2007 to date." Noted that  
8 he first treated the plaintiff in July of 2006. In his  
9 medical source statement he indicated that plaintiff could be  
10 expected to be off task between 30 percent and 50 percent of  
11 the time. Obviously, something that is inconsistent with  
12 gainful employment. And also indicated that plaintiff would  
13 be absent more than three times per month. The statement is  
14 at 697 -- I'm sorry, it comes in two parts; page 1 at 697,  
15 pages 2 and 3 appear to be at 627 and 628. I know it's kind  
16 of difficult to piece them together.

17 Administrative Law Judge Koennecke at pages 20 and  
18 21 found that Dr. Barrett's report was entitled to no weight  
19 because it was rendered years after the relevant period. But  
20 as I indicated, it states at the outset that it is valid from  
21 September 30, 2007 forward. She cites inconsistency of the  
22 record based on exercise and a return to part-time work. The  
23 *Burgess* factors clearly were not addressed specifically. It  
24 overlooks the fact that plaintiff underwent shoulder surgery  
25 in 2010 and had continued shoulder, vaginal and

1 gastrointestinal issues.

2 Dr. Nichols rendered two reports, one on  
3 December 20, 2016, again stating at the outset, "This  
4 assessment is valid for the period from at least  
5 September 30, 2007 to date." Noted that he first treated the  
6 plaintiff in July of 2006. I take that back; I'm looking at  
7 the wrong one. The first was -- both were issued on  
8 November 28, 2017. The first, again, indicates, "This  
9 assessment is valid for the period from at least  
10 September 30, 2007 to date." It appears in the record at 952  
11 through 954 of the Administrative Transcript. It identifies  
12 symptoms including pain, altered range of motion, weakness,  
13 anxiety, depression, impaired concentration and focus. It  
14 indicates that plaintiff would be expected to be off task  
15 between 30 percent and 50 percent of the time, and absent  
16 more than three times per month. It also limits plaintiff to  
17 walking two hours in an eight-hour day, standing one hour in  
18 an eight-hour day, and sitting four hours in an eight-hour  
19 day, and indicating that plaintiff cannot lift anything even  
20 up to 10 pounds in a competitive work situation.

21 The second opinion from Dr. Nichols appears at 949  
22 to 951 of the Administrative Transcript. It indicates again,  
23 "This assessment is valid for the period from at least  
24 September 30, 2007 to date." It indicates that plaintiff  
25 would be off task more than 50 percent of the time. It

1 indicates that plaintiff's ability to deal with stress is  
2 poor and plaintiff's demonstrated reliability is also  
3 assessed as poor.

4           The doctor also indicated on page 951, "I have  
5 known the plaintiff since we were both children. I am  
6 intimately familiar with her personal and medical history. I  
7 have served as her physician for many years. I have a high  
8 degree of confidence in my analysis of her abilities and  
9 capacities."

10           Again at page 21 Administrative Law Judge Koennecke  
11 in a paragraph finds the opinion of Dr. Nichols entitled to  
12 no weight. There is no specific mention of the mental health  
13 medical source statement. It is referenced; Exhibit 31F and  
14 19F are both referenced. Administrative Law Judge Koennecke  
15 does reference the opinions of Dr. Nichols suggesting that it  
16 might be two separate documents; however, she also uses the  
17 plural when referring to the single medical source statement  
18 of Dr. Barrett. At page 21 she references the opinions of  
19 Michael Barrett.

20           The opinion clearly was rendered in 2017, which the  
21 Administrative Law Judge indicates, but Administrative Law  
22 Judge Koennecke does not specifically reference the *Burgess*  
23 factors. It's unclear to the Court whether the mental health  
24 medical source statement was considered and why it was  
25 rejected. I note that ALJ Koennecke concluded at page 18,

1 "With regard to mental health issues, there is no evidence  
2 during the period in question." There is evidence in the  
3 record of mental health issues. Plaintiff has been  
4 prescribed Lorazepam for anxiety and Cymbalta for depression.  
5 She indicated anxiety August 5, 2009, at page 814, and stress  
6 at 815. Frequent crying is referenced on October 30, 2009.  
7 That's at page 817. Anxiety again referenced at page 821 to  
8 822. Depression on October 5, 2010, that's at 824.

9 About the time that we're talking about, the  
10 relevant period, on August 31, 2011, there is reference to  
11 anxiety and depression and plaintiff being on Cymbalta.  
12 That's at page 830 of the Administrative Transcript. On  
13 December 12, 2011 plaintiff reports alcoholism, anxiety,  
14 frequent crying, depression, and stress, at page 832, and is  
15 diagnosed as suffering from anxiety, 833.

16 So, I am not confident, as *Estrella* requires, that  
17 the Treating Source Rule was not violated to the  
18 consideration of the opinions of Dr. Barrett and Dr. Nichols,  
19 and particularly the mental health issue addressed by  
20 Dr. Nichols. I know that Dr. Kamin at page 67 stated that,  
21 "Insufficient evidence to establish a medically determinable  
22 impairment during the adjudicative period." But the courts  
23 have cautioned on rejecting medical source opinions from  
24 treating sources by reliance on a particularly vague  
25 statement by a non-examining source.



1           The other issue I have, and I hold ALJ Koennecke in  
2 regard, but I know that there is a significant volume that  
3 some of these decisions are written by decision writers, but  
4 I am concerned about the errors that appear in her decision.  
5 I agree that the error concerning plaintiff's age probably  
6 would not have changed the outcome; it would have applied  
7 Rule 202.13 as opposed to 202.20. And, in any event, the  
8 vocational expert had the correct age information when  
9 rendering opinions concerning available work.

10           A little more concerning is the statement about  
11 returning to work as a waitress in 2011, at the critical time  
12 period, it comes after the shoulder surgery, it's a relevant  
13 time period, and the earnings aren't reflected and her  
14 testimony is not to the effect that she returned to work as a  
15 waitress in 2011. And the fact that she had a second surgery  
16 on her shoulder in 2015 reveals that there have been residual  
17 issues with regard to her shoulder.

18           In my view this is a case that needs a fresh look.  
19 I don't find any persuasive proof of disability. It really  
20 needs a fresh look at the entire record and, in particular,  
21 the medical source statement of Dr. Barrett and the two  
22 medical source statements of Dr. Nichols.

23           So, I will grant judgment on the pleadings to the  
24 plaintiff, vacating the determination of the Commissioner and  
25 remanding the matter without a directed finding of

1 disability.

2 Thank you both for excellent presentations and I  
3 hope you stay safe in these interesting times.

4 \* \* \*

5  
6 C E R T I F I C A T I O N

7  
8 I, EILEEN MCDONOUGH, RPR, CRR, Federal Official  
9 Realtime Court Reporter, in and for the United States  
10 District Court for the Northern District of New York,  
11 do hereby certify that pursuant to Section 753, Title 28,  
12 United States Code, that the foregoing is a true and correct  
13 transcript of the stenographically reported proceedings held  
14 in the above-entitled matter and that the transcript page  
15 format is in conformance with the regulations of the  
16 Judicial Conference of the United States.

17  
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19  
20 Eileen McDonough

21 EILEEN MCDONOUGH, RPR, CRR  
22 Federal Official Court Reporter  
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